LEONARD HASTINGS AINSWORTH & ANOR.

v.

CRIMINAL JUSTICE COMMISSION

HIGH COURT AUSTRALIA
MASON CJ
BRENNAN J
DAWSON J
TOOHEY J
GAUDRON J
[FC 92/009]
9 APRIL 1992

ADMINISTRATIVE LAW: *Breach of natural justice or procedural fairness - Damage of reputation - Judicial review - Whether procedural fairness provided in the Act - Or general law applies - Declaratory relief - Circumstances when its granted.*

WORDS AND PHRASES: *"Proceedings" - Whether confined to formal hearings only.*

Ainsworth Nominees Pty. Ltd., manufactured and supplied gaming or poker machines. In January 1990 the Deputy Premier of Queensland sought the advice and assistance of the Chairman of the respondent with respect to the implementation of a cabinet decision to introduce poker machines into that State. On 1 June 1990 the respondents' report was delivered. It dealt with matters of general concern and also with particular poker machine suppliers and manufacturers, including the appellants. It ascribed certain conduct to the appellants, dealt with the conduct in highly critical terms and recommended that "the Ainsworth group of companies" not be permitted to participate in the gaming machine industry in Queensland.

The activities of the appellants was largely based on the reports of other public bodies and authorities. No enquiry was made of the appellants. They were not informed of the respondents' interest in them or of its intention to report with respect to them. They were neither made aware of the matters which were eventually put against them in the report nor given an opportunity to answer them. They had no opportunity to be heard in opposition to the recommendation that "the Ainsworth group of companies" not be permitted to participate in the gaming machine industry in Queensland.

The report received wide publicity and came to the appellants' notice. They commenced proceedings alleging breach of rules of natural justice or, as it is now called procedural fairness. They sought relief by way of *certiorari* and *mandamus.*

Held:

[1] "Proceeding" must be seen as referring to any step, no matter how informal, taken in the course of or in relation to its functions and responsibilities, rather than to the formal or public steps which will sometimes attend to the discharge of those functions and responsibilities.

[2] Even if "proceeding" be construed more narrowly the nature of the respondent and its functions and responsibilities are such that a supplementary duty of fairness is necessarily to be implied in those areas involving its functions and responsibilities which are not covered by duty of fairness imposed by s. 3.21(2)(a).

[3] The Act does not indicate what conduct constitutes fairness in any particular situation. Thus, whether the matter is approached as one involving a statutory requirement (express or implied) or as one to be governed by the general law, it is necessary to turn to the general law to ascertain what, if any, entitlements to procedural fairness the appellants possessed in the present case.

[4] It does not follow that, because *mandamus* and *certiorari* are inapplicable, the appellants must leave this Court without remedy. The law with respect to procedural fairness has developed in spite of the technical aspects of the prerogative writs. The report has been made and delivered in accordance with s. 2.18 of the Act. Although it had no legal effect or consequence, it had the practical effect of blackening the appellants reputation. *Prima facie*, at least, these matters suggest that the appellants are entitled to declaratory relief of the kind granted in *Chief Constable v. Evans.*

[Appeal allowed.]

Cases referred to:

Kioa v. West [1985] 159 CLR 550 ***(cit)***

Houssein v. Under Secretary of Industrial Relations and Technology (NSW) [1982] 148 CLR 88 ***(cit)***

Reg. v. Australian Broadcasting Tribunal; Ex-parte 2 HD Pty. Ltd. [1979] 144 CLR 45 ***(cit)***

Annetts v. McCann [1990] 170 CLR 596 ***(cit)***

Testro Bros. [1963] 109 CLR 353 ***(not foll)***

Schmidt v. Secretary of State for Home Affairs [1969] 2 Ch 149 ***(cit)***

Breen v. Amalgamated Engineering Union [1971] 2 QB 175 ***(cit)***

Reg. v. Liverpool Corpn., Ex-parte Liverpool Taxi Fleet Operators' Association [1972] 2 QB 299 ***(cit)***

Twist v. Randwick Municipal Council [1976] 136 CLR 106 ***(cit)***

Salemi v. Mackellar [No. 2] [1977] 137 CLR 396 ***(cit)***

Heatley v. Tasmanian Racing and Gaming Commission [1977] 137 CLR 487 ***(cit)***

FAI Insurances Ltd. v. Winneke [1982] 151 CLR 342 ***(cit)***

In re Pergamon Press Ltd. [1971] Ch 388 ***(foll)***

Mahon v. Air New Zealand [1984] AC 808 ***(foll)***

National Companies and Securities Commission v. News Corpn. Ltd. [1984] 156 CLR 296 ***(foll)***

Brettingham-Moore v. St. Leonards Municipality [1969] 121 CLR 509 ***(cit)***

Fisher v. Keane [1879] 11 Ch D 353 ***(cit)***

South Australia v. O'Shea [1987] 163 CLR 378

Reg. v. Criminal Injuries Compensation Board, Ex-parte Lain [1967] 2 QB 864 ***(cit)***

Reg. v. Collins; Ex-parte ACTU - Solo Enterprises Pty. Ltd. [1976] 50 ALJR 471; 8 ALR 691 ***(cit)***

Re Royal Commission on Thomas Case [1980] 1 NZLR 602 ***(cit)***

Reg. v. Marks; Ex-parte Australian Building Construction Employees and Builders Labourer's Federation [1981] 147 CLR 471 ***(cit)***

Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group [1969] 122 CLR 546 ***(cit)***

Chief Constable v. Evans [1982] 1 WLR 1155; [1982] 3 All ER 141 ***(foll)***

Forster v. Jododex Aust. Pty. Ltd. [1972] 127 CLR 421 ***(cit)***

In re Judiciary and Navigation Acts [1921] 29 CCR 257 ***(cit)***

Russian Commercial and Industrial Bank v. British Bank for Foreign Trade, Ltd. [1921] 2 AC 438 ***(cit)***

University of New South Wales v. Moorhouse [1975] 133 CLR 1 ***(cit)***

Gardner v. Diary Industry Authority (NSW) [1977] 52 ALJR 180 ***(cit)***

Mohan v. Air New Zealand [1984] AC 808 ***(foll)***

National Companies and Securities Commission v. News Corpn. Ltd. [1984] 156 CLR 296 ***(foll)***

Addis v. Crocker [1961] 1 QB 11

Calveley v. Chief Constable of Merseyside [1989] AC 1228 ***(cit)***

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(cit)***
Reg. v. Criminal Injuries Compensation Board, Ex-parte Lain [1967] 2 QB 864 ***(cit)***
Board of Fire Commissioners (NSW) v. Ardouin [1961] 109 CLR 105 ***(cit)***
Hudson v. Venderheld [1968] 118 CLF 171 ***(cit)***
Attorney-General (NSW) v. Quin [1990] 170 CLR 1 ***(cit)***
Calvin v. Carr [1980] AC 574 ***(cit)***
Reg. v. Australian Stevedoring Industry Board; Ex-parte Melbourne Stevedoring Co. Pty. Ltd. [1953] 88 CLR 100 ***(cit)***
Maxwell v. Dept. of Trade [1974] QB 523 ***(cit)***
Ibeneweka v. Egbuna [1964] 1 WLR 219 ***(cit)***
Re Tooth & Co Ltd. [1978] 31 FLR 314 ***(cit)***

Legislation referred to:

Criminal Justice Act 1989 [Aust], ss. 1.3(b), 2.1(1), 2.14(1), (a), (b), (2)(c), 2.15(e), (f), (i), (iv), 2.17, 2.18, (1), (a), (b), (c), (2), (3), (4), (5) 2.20(2)(a), 2.45(1)(a), (b), 2.47, 2.51, 3.17, (a), 3.21(1), (2), (a), (c), (ii), 4.1(1), 4.8(1), (a), (b), (c)
Gaming Machine Act 1991 [Aust], ss. 3.3(1)(b)(ii), (iii), 6.16(1)(d)(i)

Other sources referred to:

Criminal Justice Commission, Queensland, Report on *Gaming Machine Concerns and Regulations,* May 1990. p. 32
"Public or Private? State Employees and Judicial Review", Fredman and Morris, [1991], 107 Law Quarterly Review 298, pp. 308-309

JUDGMENT

Mason CJ, Dawson, Toohey, Gaudron JJ:

The first appellant, Leonard Hastings Ainsworth, is the managing director of the second appellant, Ainsworth Nominees Pty. Ltd., Ainsworth Nominees Pty. Ltd., manufactures and supplies gaming or poker machines.

The respondent, the Criminal Justice Commission (the Commission), is a corporation. constituted under s. 2.1(1) of the Criminal Justice Act 1989 (Q.) (the Act) with the functions and responsibilities set out in ss. 2.14 and 2.15. Broadly speaking, it is charged with a duty to monitor, review, co-ordinate and initiate reform of the administration of criminal justice in Queensland (s. 2.14(1)(a)) and through its organizational units, with investigating the incidence of official misconduct (s. 2.20(2)(a)), researching the problems of the administration of criminal justice (s. 2.45(l)(a)), co-ordinating the activities of other agencies concerned with the administration of criminal justice (s. 2.45(1)(b)), gathering intelligence concerning criminal activities and persons (s. 2.47) and protecting witnesses: s. 2.51.

The Act provides in Pt IV for the establishment and appointment of a parliamentary body, called the Parliamentary Criminal Justice Committee (the Parliamentary Committee): Section 4.1(1). Its purpose is to inform the Legislative Assembly on the activities of the Commission and on matters pertinent thereto: s. 1.3(b). Its functions and powers are set out in s. 4.8.

In January 1990, the Deputy Premier of Queensland, as Chairman of a Cabinet sub-committee, sought the advice and assistance of the Chairman of the Commission with respect to the implementation of a Cabinet decision to introduce poker machines into that State. It was agreed between the Chairman of the Commission and the Deputy Premier that the Commission would advise as to "areas of likely difficulty". It was understood, it seems, that the Commission would report on the matter pursuant to s. 2.14(2)(c) and in accordance with s. 2.18 of the Act and that is what in due course happened. It may be that it was also understood that the Parliamentary Committee would conduct public hearings after it received the Commission's report. That has also happened.

Subject to an exception which does not bear on the present matter, s. 2.18(1) provides:

> ... a report of the Commission ... shall be furnished -
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> (a) to the chairman of the Parliamentary Committee;
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> (b) to the Speaker of the Legislative Assembly; and
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> (c) to the Minister.

If the Assembly is not sitting, the Speaker is required to deliver the report to the Clerk of the Parliament and order that it be printed: s. 2.18(3). Once printed, the report is "deemed for all purposes to have been tabled in and printed by order of the Legislative Assembly" and is "granted all the immunities and privileges of a report so tabled and printed": s. 2.18(4). A report, including a report that has been printed under s. 2.18(2), must be tabled in the Legislative Assembly on the next sitting day after it is received by the Speaker and must be ordered by the Legislative Assembly to be printed: s. 2.18(5).

On 1 June 1990, the Commission's report, entitled *Report on Gaming Machine Concerns and Regulations*, was delivered to the persons specified in s. 2.18(1)(a), (b) and (c) of the Act. It dealt with matters of general concern and also with particular poker machine suppliers and manufacturers, including the appellants. It ascribed certain conduct to the appellants, dealt with that conduct in highly critical terms and recommended that "the AINSWORTH group of companies not be permitted to participate in the gaming machine industry in Queensland" Criminal Justice Commission, Queensland, *Report on Gaming Machine Concerns and Regulations*, May 1990, p. 32.

So far as it concerns the activities of the appellants, the Commission's report was largely based on the reports of other public bodies and authorities. It is not clear what, if any, steps were taken to check their accuracy. In any event, no enquiry was made of the appellants: they were not informed of the Commission's interest in them or of its intention to report with respect to them. More particularly, they were neither made aware of the matters which were eventually put against them in the report nor given an opportunity to answer them. And, of course, they had no opportunity to be heard in opposition to the recommendation that "the AINSWORTH group of companies" not be permitted to participate in the gaming machine industry in Queensland.

The report received wide publicity and came to the appellants' notice. They commenced proceedings in the Supreme Court of Queensland alleging breach of the rules of natural justice or, as it is now called, procedural fairness *Kioa v. West* [1985] 159 CLR 550.They sought relief by way of *certiorari* and *mandamus*.

It was held on the return of an order *nisi* before the Full Court (McPherson, Lee and Mackenzie JJ) that the course adopted by the Commission was not one which attracted a duty of fairness under the Act. Nor, in the view of the Full Court, was there a duty of fairness under the general law because the report did not affect any right, interest or legitimate expectation of the appellants. Finally, it was held that, even if there was a duty of fairness, the case was not appropriate for the grant of relief, whether by way of *certiorari*, *mandamus* or, as was sought in the course of argument, by way of declaration. The order *nisi* was discharged. The appellants now appeal to this Court.

The appellants put their case on two bases. First, they say that the Act obliged the Commission to act in a way that ensured procedural fairness. Alternatively, they argue that that duty arose under the general law and was not excluded by the Act.

It is common ground that the report was made and delivered in exercise of one or other of the functions and responsibilities set out respectively in s. 2.14(1)(b) and s. 2.14(2)(c) and in s. 2.l5(e) and (f)(i) and (iv). Section 2.14(1) relevantly provides:

> The Commission shall -
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> ...
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> (b) discharge such functions in the administration of criminal justice as, in the Commission's opinion, are not appropriate to be discharged, or cannot be effectively discharged, by the Police Force or other agencies of the State.
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> In discharging its functions the Commission shall:
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> (a) wherever practicable, consult with persons or bodies of persons known to it to have special competence or knowledge in the area of the administration of criminal justice concerned, and seek submissions from the public;
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> and
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> (b) in its report thereon, shall present a fair view of all submissions and recommendations made to it on the matter in relation to which it is discharging its functions, whether such submissions and recommendations are supportive of, or contrary to, the Commission's recommendations on the matter.

Section 2.14(2)(c) provides that, subject to s. 2.18, the Commission shall report to the Parliamentary Committee:

> when the Commission thinks it appropriate to do so with respect to that matter, in relation to any matter that concerns the administration of criminal justice.

The responsibilities imposed on the Commission by s. 2.15 include:

> (e) researching, generating and reporting on proposals for reform of the criminal law and the law and practice relating to enforcement of, or administration of, criminal justice, including assessment of relevant initiatives and systems outside the State;
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> (f) in discharge of such functions in the administration of criminal justice as, in the Commission's opinion, are not appropriate to be discharged, or cannot be effectively discharged, by the Police Force or other agencies of the State, undertaking
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> (i) research and co-ordination of the processes of criminal law reform;
>
> ...
>
> (iv) investigation of organized or major crime.

The appellants no longer argue that s. 2.14, by imposing a duty on the Commission to consult and to present a fair view of submissions and recommendations, imposes a duty of fairness with respect to the report that was made in this case. Instead, they rely on s. 3.21(2) which is in Div. 2 of Pt III of the Act. By s. 3.17 the provisions of Div. 2 of Pt III apply to:

> (a) all proceedings conducted in discharge of any of the functions and responsibilities of the Commission;
>
> (b) all proceedings conducted in discharge of any of the functions of any organizational unit of the Commission.

By s. 3.21(1) the Commission is expressly exempted from rules and practices relating to evidence and procedure and is empowered to "inform itself on any matter and conduct its proceedings as it thinks proper". Then, s. 3.21(2) provides:

> The Commission shall, at all times -

(a) act independently, impartially, fairly, and in the public interest;

(b) act openly, except where to do so would be unfair to any person or contrary to the public interest;

(c) include in its reports -

(i) its recommendations with respect to the relevant subject-matter;

(ii) an objective summary and comment with respect to all considerations of which it is aware that support or oppose or are otherwise pertinent to its recommendations.

The Full Court held that the duty to act fairly imposed by s. 3.21(2)(a) had no application in the present case because, by s. 3.17, that duty was imposed in relation to proceedings, rather than in relation to the discharge of the functions and responsibilities of the Commission, and the process which led to the report - a process described by McPherson J as "researching, compiling, preparing and adopting" - could not be said to be a proceeding falling within s. 3.17 of the Act.

Given that the Commission is authorized by s. 3.21(1) to "inform itself on any matter and conduct its proceedings as it thinks proper", "proceedings", when used in s. 3.17, cannot be confined to formal hearings held pursuant to s. 2.17. That section authorizes the Commission "to conduct a hearing in relation to any matter relevant to the discharge of its functions or responsibilities". And, in any event, "proceedings" is a word of wider meaning than the word "hearing". These considerations and the nature of the functions vested in the Commission and its organizational units indicate that "proceedings" in s. 3.17 should be given a broad, rather than a narrow, meaning. Division 2 of Pt III is expressed to apply to "all proceedings" conducted, not only in discharge of the functions and responsibilities of the Commission, but also in discharge of the functions of any organizational unit of the Commission. They are very important functions and responsibilities and are of a very wide variety, including researching and generating proposals for law reform. Indeed, once the Commission is seen as a body possessing functions and responsibilities of that kind and scope and empowered to conduct its proceedings in any manner that it thinks proper, "proceedings" must be seen as referring to any step, no matter how informal, taken in the course of or in relation to its functions and responsibilities, rather than to the formal or public steps which will sometimes attend the discharge of those functions and responsibilities.

The duty of impartiality and the duty to act in the public interest laid down by s. 3.21(2)(a) tend to confirm that "proceedings" in s. 3.17 is to be construed broadly so as to include any step taken in the course of or in relation to the Commission's functions and responsibilities. The nature and purposes of the Commission and its organizational units are such that it is unthinkable that it might, in any circumstance whatsoever and whether discharging its functions or responsibilities or merely taking some step in the course of or in relation to them, proceed in a way that is partial or contrary to the public interest.

The requirement in s. 3.2l(2)(a) that the Commission act fairly also bears on the meaning of "proceedings"· A requirement to act fairly may not be in quite the same category as the requirement to act impartially or in the public interest. However, a body established for purposes and with powers and functions of the kind conferred on the Commission and its organizational units is one whose powers would ordinarily be construed as subject to an implied general requirement of procedural fairness, save to the extent of clear contrary provision. That is because it is improbable that, though it did not say so, the Legislature would intend that a body of that kind should act unfairly. The considerations which would warrant the implication of a general obligation of fairness tend to confirm that same broad meaning of "proceedings". That is because it is also improbable that the legislature intended

that the Commission's duty to act fairly, when discharging its functions and responsibilities or even when taking a step in the course of or in relation to them, should, to any extent, be left to implication or to the general law.

In our view, "proceedings" in s. 3.17 is to be construed as including any step taken in the course of or in relation to the functions and responsibilities of the Commission. But even if it is construed more narrowly, it does not follow, as was suggested in the course of argument, that s. 3.21(2)(a) provides exclusively and exhaustively with respect to fairness, with the consequence that any duty of fairness arising under the general law is excluded in other situations. More particularly, it does not follow, as is implicit in that suggestion, that, by choosing one course rather than another, the Commission may act in a manner that is unfair.

The principles of construction embodied in the *maxims expressio unius est exclusio alterius* and *expressum facit cesssare tacitum,* if applied in this case, would lead to the conclusion that s. 3.21(2)(a) excludes any wider duty of fairness than that there specified. However, those principles are to be applied with caution See, in relation to *expressio unius, Houssein v. Under Secretary of Industrial Relations and Technology (NSW)* [1982] 148 CLR 88. See also *Reg. v. Australian Broadcasting Tribunal; Ex parte 2HD Pty. Ltd.* [1979] 144 CLR 45. They are not to be applied if they would bring about a result which the legislature is unlikely to have intended. And, as has already been noted, if it did not say so, it is highly unlikely that the Parliament intended that the Commission should act unfairly. Thus, even on the hypothesis that "proceedings" should be construed narrowly, ss. 3.17 and 3.21(2)(a) are not effective to exclude duties of fairness imposed by the general law in the situations not specifically dealt with by the Act. Indeed, it follows from what has already been said that, on that hypothesis, the nature of the Commission and its powers, functions and responsibilities are such that, to the extent that the Act does not provide, a duty of fairness is necessarily to be implied in all areas involving its functions and responsibilities.

It does not matter whether the present case is approached on the basis that "proceedings" includes any step in the course of or in relation to the functions and responsibilities of the Commission or on some narrower basis. On the first approach, s. 3.21(2)(a) imposes a duty to act fairly, although, of course, it remains to be ascertained what, if anything, that is required in this case. And even if "proceedings" be construed more narrowly, the nature of the Commission and its functions and responsibilities are such that a supplementary duty of fairness is necessarily to be implied in those areas involving its functions and responsibilities which are not covered by the duty of fairness imposed by s. 3.21(2)(a). Or, to put the matter at its lowest, for the same reason that ss. 3.17 and 3.21(2)(a) do not prevent the implication of a supplementary duty of fairness, they are ineffective to exclude any duty of fairness arising under the general law. In particular they are incapable of excluding the rules of natural justice for they can only be "excluded by plain words of necessary intendment" *Annetts v. McCann* [1990] 170 CLR 596, per Mason CJ, Deane and McHugh JJ.

The Act does not indicate what conduct constitutes fairness in any particular situation. Thus, whether the matter is approached as one involving a statutory requirement (express or implied) or as one to be governed by the general law, it is necessary to turn to the general law to ascertain what, if any, entitlements to procedural fairness the appellants possessed in the present case.

The process which led to the report may be described as one of inquiry and investigation. Obviously, not every inquiry or investigation has to be conducted in a manner that ensures procedural fairness. On the other hand, it does not follow that there was no duty of that kind simply because the Commission was engaged in an exercise of that kind.

It was held in *Testro Bros. Pty. Ltd. v. Tait* [1963] 109 CLR 353 that procedural fairness was not required in an investigation conducted by an inspector under the Companies Act 1961 (Vict.), because it was not "in the nature of a judicial proceeding in which the rights of the company ... being investigated may be prejudicially affected by a report made to the Minister" *ibid*, at p. 363. However, it was said in *Annetts* [1990] 170 CLR, per Mason CJ, Deane and McHugh JJ that the view of the majority in that case would not prevail today.

It is now clear that a duty of procedural fairness arises, if at all, because the power involved is one which may "destroy, defeat or prejudice a persons' rights, interests or legitimate expectations" *ibid*, at p. 598. Thus, what is decisive is the nature of the power, not the character of the proceeding which attends its exercise. That is not to deny that provision may be made permitting or requiring procedures which are wholly inconsistent with a requirement of procedural fairness. However, *Testro Bros.* was not concerned with provisions of that kind, and thus, so far as the decision in that case was based on the character of the proceeding, it is inconsistent with the law as it has developed since the decision in *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149; see also *Breen v. Amalgamated Engineering Union* [1971] 2 QB 175; *Reg. v. Liverpool Corpn., Exparte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299 and since the decision of this Court in *Kioa v. West* [1985] 159 CLR 550. For earlier developments see also *Twist v. Randwick Municipal Council* [1976] 136 CLR 106; *Salemi v. Mackellar* [No. 2] [1977] 137 CLR 396; *Heatley v. Tasmanian Racing and Gaming Commission* [1977] 137 CLR 487; *FAI Insurances Ltd. v. Winneke* [1982] 151 CLR 342. In this regard, it is sufficient to note that it was held in *In re Pergamon Press Ltd.* [1971] Ch. 388 and in *Mahon v. Air New Zealand* [1984] AC 808 that the investigative powers considered in those cases attracted a duty to act fairly. And the decision of this Court in *National Companies and Securities Commission v. News Corpn. Ltd.* [1984] 156 CLR 296 proceeds on the same basis. However, that case was concerned with the content of a statutory duty, rather than whether there was a duty of fairness under the general law.

So far as the decision in *Testro Bros.* is based on the view that rights could not be prejudicially affected by the report there in issue, it is a decision which, to some extent, is confined to its own facts See *Brettingham-Moore v. St. Leonards Municipality* [1969] 121 CLR 509. And, as the law has progressed since that case, the only question which now arises is whether the report adversely affected a legal right or interest, including an interest falling within the category of legitimate expectation, such that the Commission was required to proceed in a manner that was fair to the appellants.

As earlier indicated, the Full Court took the view that the report did not affect the rights, interests or legitimate expectations of the appellants in a way that required procedural fairness. The appellants claimed that their business reputation was an interest which had been adversely affected by the report. This was rejected by the Full Court on the basis, as stated by McPherson J, that there was nothing to show that any existing business "reputation or goodwill [on the part of the appellants in Queensland was] ... placed in jeopardy by the Report of the Commission". But the law proceeds on the basis that reputation itself is to be protected. And the Commission's report, published in the manner required by s. 2.18 of the Act, could only ensure that, thereafter, the appellants' reputations in Queensland would be of the worst kind.

It has long been accepted that reputation is an interest attracting the protection of the rules of natural justice. Thus, over a century ago, Jessel MR said in *Fisher v. Keane* [1879] 11 Ch. D. 353:

> according to the ordinary rules by which justice should be administered by committees of clubs, or by any other body of persons who decide upon the conduct of others, [they ought not] to blast a man's reputation for ever - perhaps to ruin his prospects for life, without giving him an opportunity of either defending or palliating his conduct.

And, as recently as l990, Brennan J said in *Annetts* [1990] 170 CLR see also *Heatley* [1977] 137 CLR, per Murphy J, Aickin J; *Kioa* [1985] 159 CLR; *Mahon* [1984] AC that:

> Personal reputation has now been established as an interest which should not be damaged by an official finding after a statutory inquiry unless the person whose reputation is likely to be affected has had a full and fair opportunity to show why the finding should not be made.

The same is true of business or commercial reputation See *In re Pergamon Press Ltd.* [1971] Ch; *Mahon* [1984] AC. And it matters not that, instead of an express finding, there is, as here, an adverse recommendation based on the reports of other bodies or authorities. That being so, the appellants were entitled to procedural fairness.

It was argued on behalf of the Commission that the appellants had not been deprived of any entitlement to procedural fairness because the entitlement arose in an entire process which included the public hearings of the Parliamentary Committee. It was put that that entitlement had been or might yet be satisfied in the course of those hearings.

It is not in doubt that, where a decision-making process involves different steps or stages before a final decision is made, the requirements of natural justice are satisfied if "the decision-making process, viewed in its entirety, entails procedural fairness" *South Australia v. O'Shea* [1987] 163 CLR 378, per Mason CJ. The difficulty in the present case is in viewing the Commission and the Parliamentary Committee as engaged in the one decision-making process. That is because the report was the final step in the discharge by the Commission of the functions and responsibilities which were brought into play by its decision to investigate and report with respect to the introduction of poker machines. Moreover, the functions and responsibilities of the Commission and of the Parliamentary Committee are separate and distinct and serve quite different purposes.

The functions of the Parliamentary Committee are stated in s. 4.8(1) of the Act. The only functions which might possibly bear on the present matter are those stated in para. (a) and (b), namely:

> (a) to monitor and review the discharge of the functions of the Commission as a whole and of the Official Misconduct Division in particular;
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> (b) to report to the Legislative Assembly, with such comments as it thinks fit, on any matters pertinent to the Commission, the discharge of the Commission's functions or the exercise of the powers of the Commission, a Commissioner, or of officers of the Commission, to which the attention of the Assembly should, in the committee's opinion, be directed.

These functions are very different from those of the Commission. They are directed to the entirely different purposes of monitoring and supervising the Commission, and of reporting to the Parliament with respect to its activities.

It may be that, in a particular case and as an incident to the discharge of its own functions and responsibilities, the Parliamentary Committee will redress an unfairness perpetrated by the Commission. But that is not its function. And certainly it is under no obligation in that regard. It may be that the Parliamentary Committee has redressed or will redress the unfairness involved in this case - at least in the sense of giving the appellants an opportunity to answer what was put against them in the report. But, if so, that cannot alter the fact that their reputation was blackened in circumstances in which the Commission should have given, but did not give, them an opportunity to put their side of the matter.

It remains to be considered whether the appellants should be granted relief. Their claim for relief by way of *mandamus* seeks an order requiring the Commission to inform them of the evidence it has concerning them and to permit them to test that evidence and put a contrary case. Additionally, they ask that the Commission be required, in terms of s. 3.21(2)(c)(ii) of the Act, to provide in its report "an objective summary and comment with respect to all considerations of which it is aware that support or oppose or are otherwise pertinent to its recommendations.

The claim for relief by way of *mandamus* is based on the view that the Commission is under a duty to investigate and report with respect to the appellants in relation to the introduction of poker machines into Queensland. That view is misconceived. The Commission is under no duty to investigate the appellants, unless, in terms of ss. 2.14(1)(b) and 2.15(f), to do so is a function "in the administration of criminal justice [which], in the Commission's opinion, [is] not appropriate to be discharged, or cannot be effectively discharged, by the Police Force or other agencies of the State". And, under s. 2.14(2)(c), it is under a duty to report only if it "thinks it appropriate to do so".

In the circumstances of this case, the fact that the Commission was once of the opinion that it should investigate and report with respect to the appellants does not indicate that it is still of that opinion. If, as will appear subsequently, the Court can make a declaration that, in reporting adversely to the appellants, the Commission failed to observe the rules of procedural fairness, the Commission may well now be of the opinion that it is not appropriate to pursue an investigation of the appellants and make a report with respect to them. The Court should not make an order which constrains the Commission's freedom to decide that it will not pursue an investigation when the Court can make an order which will otherwise sufficiently protect the appellants. In saying that a declaration will otherwise sufficiently protect the appellants, we are mindful that this is not a case in which the appellants seek a writ of *mandamus* to compel the performance of a duty to do something which, if done, will or could result in the appellants obtaining a tangible benefit or entitlement such as a licence or franchise.

The precise relief sought by way of *certiorari* is that "the ... proceedings of the Criminal Justice Commission [be removed] for the purpose of quashing all findings of the ... Commission in the Report on Gaming Machine Concerns and Regulations which relate to [appellants] or the 'Ainsworth group', as that term is used in the ... Report".

The function of *certiorari* is to quash the legal effect or the legal consequences of the decision or order under review. The report made and delivered by the Commission has, of itself, no legal effect and carries no legal consequences, whether direct or indirect. It is different when a report or recommendation operates as a precondition or as a bar to a course of action See, for example, *Brettingham-Moore v. St. Leonards Municipality* [1969] 121 CLR, especially per Barwick CJ; *Reg. v. Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 QB 864, or as a step in a process capable of altering rights, interests or liabilities See *Lain* [1967] 2 QB, per Diplock LJ; per Lord Parker CJ; see also *Testro Bros.* [1963] 109 CLR, per Kitto J; per Menzies J. A report or a recommendation of that kind may be quashed, that is to say its legal effect may be nullified by *certiorari.* But the Commission's report is not in that category. The report may bear upon the appellants' prospects of obtaining licences under the Gaming Machine Act 1991 (Q) for that Act, in s. 3.3(1)(b)(ii) and (iii), make reputation a matter to be taken into account in determining whether a licence should be granted. However, like the report considered in *Reg. v. Collins; Ex-parte ACTU - Solo Enterprises Pty. Ltd.* [1976] 50 ALJR 471; 8 ALR 691, the report does not "legally affect ... rights", for it may be that the appellants will be granted such licence or licences under the Gaming Machine

Act l991 as they request "even ... in direct opposition to any recommendations [made] in it" *ibid*., at p. 475; p. 699 of ALR by the Commission. There being no legal effect or consequence attaching to the report, *certiorari* does not lie to correct the failure of the Commission to comply with its duty to proceed in a way that was fair to the appellants.

It does not follow that, because *mandamus* and *certiorari* are inapplicable, the appellants must leave this Court without remedy. The law with respect to procedural fairness has developed in spite of the technical aspects of the prerogative writs. Moreover, had the appellants had advance notice of the Commission's intention to report adversely, its failure to observe the requirements of procedural fairness would have entitled them to relief by way of prohibition *Reg. v. Liverpool Corpn., Ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB,; *Re Royal Commission on Thomas Case* [1980] 1 NZLR 602; see also *Reg. v. Marks; Ex-parte Australian Building Construction Employees and Builders Labourers' Federation* [1981] 147 CLR 471, per Mason J; *Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* [1969] 122 CLR 546 preventing it from reporting adversely without first giving them an opportunity to answer the matters put against them and to put submissions as to findings or recommendations that might be made See *Mahon* [1984] AC; *Annetts* [1990] 170 CLR, per Mason CJ, Deane and McHugh JJ; per Brennan J. Instead, the report has been made and delivered in accordance with s. 2.18 of the Act. And, although it had no legal effect or consequence, it had the practical effect of blackening the appellants' reputations. *Prima facie,* at least, these matters suggest that the appellants are entitled to declaratory relief of the kind granted in *Chief Constable v. Evans* [1982] 1 WLR 1155; [1982] 3 All ER 141.

It is now accepted that superior Courts have inherent power to grant declaratory relief. It is a discretionary power which "[i] It is neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise." *Forster v. Jododex Aust. Pty. Ltd.* [1972] 127 CLR 421, per Gibbs J. However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. See *In re Judiciary and Navigation Acts* [1921] 29 CLR 257. The person seeking relief must have "a real interest" *Forster* [1972] 127 CLR, per Gibbs J; *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.* [1921] 2 AC 438, per Lord Dunedin and relief will not be granted if the question "is purely hypothetical", if relief is "claimed in relation to circumstances that [have] not occurred and might never happen" *University of New South Wales v. Moorhouse* [1975] 133 CLR 1, per Gibbs J or if "the Court's declaration will produce no foreseeable consequences for the parties" *Gardner v. Diary Industry Authority (NSW)* [1977] 52 ALJR 180, per Mason J; see also per Aickin J; 18 ALR 55.

The present case involves no mere hypothetical question. At all stages there has been a controversy as to the Commission's duty of fairness. A report has been made and delivered under s. 2.18 of the Act. That report has already had practical consequences for the appellants' reputations. For all that is known, those consequences may extend well into the future. It is appropriate that a declaration be made in terms indicating that the appellants were denied natural justice. That may redress some of the harm done.

The appeal should be allowed. The order of the Full Court of the Supreme Court of Queensland should be set aside and in lieu thereof, it should be declared that, in reporting adversely to the appellants in its *Report on Gaming Machine Concerns and Regulations*, the Commission failed to observe the requirements of procedural fairness. The order *nisi* for writs of *certiorari* and *mandamus* should be discharged. The Commission should pay the appellants' costs of the proceedings in the Supreme Court and of this appeal.

Brennan J:

The appellants, whose business activities include the supply of gaming machines, complain that the Criminal Justice Commission (the Commission) constituted by the Criminal Justice Act 1989 (Q) (the Act), produced and furnished a report adverse to the appellants' reputations without according them natural justice. The appellants seek judicial review. But the report produced by the Commission (hereafter "the Report") did not affect the appellants' legal rights or liabilities and it did not subject their rights or liabilities to any new hazard. There has been no exercise of a statutory power the setting aside of which would change the appellants' legal rights or liabilities. The only, though significant, way in which the report affected the interests of the appellants was by damaging their reputations. Damage to reputation has a particular significance for the suppliers of gaming machines, for s. 6.16(1)(d)(i) of the Gaming Machine Act 1991 (Q.) (enacted after the Report was furnished) prescribes the reputation of a tenderer for the supply of gaming machines to be a factor to be taken into account in the awarding of a contract for the purchase of gaming machines.

In a majority of cases in which an act or decision is judicially reviewed, an exercise of statutory power affects the applicant's rights adversely or there is a failure to exercise a statutory power which, if exercised, would or might affect the applicant's rights beneficially. In such cases, where a person's rights or liabilities will or might be affected by the exercise or non-exercise of a statutory power following upon an inquiry, that person is *prima facie* entitled to be accorded natural justice in the conduct of the inquiry. Failure to accord that person natural justice ordinarily results in the setting aside of an adverse exercise of the power or in an order to exercise the power, as the case may be. The order made in such cases does not operate on the failure to observe the rules of natural justice or on the findings made on the inquiry but on the consequential exercise or non-exercise of the power. Thus, in *Mahon v. Air New Zealand* [1984] AC 808 where a Commissioner of Inquiry was found not to have accorded natural justice to a party against whom he made an adverse finding in his report, the Privy Council set aside the Commissioner's order awarding costs against that party but declined to set aside the adverse findings. Their Lordships said *ibid*., at p. 840 that they:

> will refrain from going into the question whether upon an application for judicial review of a report of a tribunal of inquiry there is jurisdiction in the reviewing Court to set aside a finding of fact that is gravely defamatory of the applicant for review, or to make a declaration that such finding is invalid. This too is a matter which, in their lordships' view, is best left to be developed by the New Zealand Courts, particularly as these remedies, if they do exist, are discretionary.

The question left open in *Mahon v. Air New Zealand* was not dealt with by this Court in *National Companies and Securities Commission v. News Corpn. Ltd.* [1984] 156 CLR 296 where the Court was not satisfied that the Commission had any statutory authority to publish matter adversely affecting the reputation of any person after holding an inquiry *ibid*., at pp. 312-313, 325, 326. The question left open in those cases must be addressed in this.

If John Doe on his own account prepares a report damaging to the reputation of Richard Roe without giving Richard Roe an opportunity to be heard on the subject of the report and then publishes the report, Richard Roe may have a remedy in libel but not in judicial review. John Doe does not purport to perform any function or exercise any power conferred upon him by statute: he simply acts, as any person is free to do, by preparing and publishing a report on a subject he chooses in a manner he chooses, subject only to the general law limitations on freedom of speech. But if a statutory authority, in purported performance of its statutory functions, prepares a report damaging to the reputation of Richard Roe without giving him an opportunity to be heard and publishes the report, does Richard Roe have a

remedy in judicial review? (We are not now concerned with his remedy in libel). Liability in libel for publishing a defamatory report in performance of a statutory function has been treated as dependent on common law doctrines of absolute or qualified privilege rather than on any protection conferred by a statute authorizing the publication of a report containing defamatory matter; the possibility of a defence of statutory authority does not appear to have been raised, except by Gibbs CJ in *News Corpn. Ltd.* [1984] 156 CLR, See *Addis v. Crocker* [1961] 1 QB 11; *In re Pergamon Press Ltd.* [1971] Ch. 388; and *cf. Calveley v. Chief Constable of Merseyside* [1989] AC 1228.

The answer to this question depends at base on the principle that any person who purports to exercise an authority conferred by statute must act within the limits and in the manner which the statute prescribes and it is the duty of the Court, as far as it can, to enforce the statutory prescription. I see no reason to confine the jurisdiction in judicial review more narrowly than this principle would acknowledge, though the armory of remedies available to the Court in particular cases may impose some limitations and judicial discretion in exercising the jurisdiction may further restrict the use of the available remedies See, for example, Fredman and Morris, *"Public or Private? State Employees and Judicial Review"*, [1991], 107 Law Quarterly Review 298, esp. at pp. 308-309. But the broad purpose of judicial review is to ensure that statutory authority, which carries with it the weight of State-approved action and the supremacy of the law, is not claimed for or attributed to decisions or acts that lie outside the statute. The conduct of a person or body of persons acting without colour of statutory authority is not amenable to judicial review. Unless, perhaps, they are purportedly acting with the authority derived from the prerogative (*Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374), a Royal Charter, franchise or custom (*Reg. v. Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864), none of which is presently relevant, but conduct in which a person or body of persons engages in purported exercise of statutory authority must be amenable to judicial review if effect is to be given to the limits of the authority and the manner of its performance as prescribed by the statute. It is immaterial that the statute defines a mere function that requires no grant of power to enable its performance: what is material to jurisdiction in judicial review is that the function is conferred by the statute. Richard Roe cannot obtain relief in judicial review against John Doe, but he is entitled to whatever remedy the Court can appropriately award in judicial review against the statutory authority.

It is especially appropriate that judicial review should be available when the function conferred by statute is to inquire into and report on a matter involving reputation, even though the report can have no effect on legal rights or liabilities, for no remedy may otherwise be available to vindicate the damaged reputation. The judgment of this Court in *Annetts v. McCann* [1990] 170 CLR 596 shows that where an inquisitorial power is being exercised without observing the rules of natural justice and reputation is at risk, the Court may order that the rules of natural justice be observed and the Court can thus, to an extent, protect the reputation at risk. In such a case, however, the protection is incidental to the constraints imposed on the proposed manner of performance of the statutory power.

Although statutory powers which are capable of exercise to affect legal rights and liabilities can be distinguished from statutory functions which are performed in exercise of the capacities possessed by all see per Kitto J in *Board of Fire Commissioners (NSW) v. Ardouin* [1961] 109 CLR 105, and *Hudson v. Venderheld* [1968] 118 CLF 171, there is no reason to restrict judicial review to the purported exercise of powers, though the major remedies of judicial review - the prerogative writs - are designed to constrain the exercise of powers rather than the performance of functions. However, statutory functions, like statutory powers, are

amenable to constraint by judicial review the remedies of which, with varying effectiveness, ensure that statutory functions are performed within the limits and in the manner prescribed by the statute conferring the function. It is no obstacle to the jurisdiction in judicial review that, in producing and furnishing a report adverse to the appellants' reputations, the Commission was doing no more than any individual might have done without a grant of statutory power and that the production and furnishing of the report enlivened no power for exercise either by the Commission or by any other person. (The furnishing of the Report in fact enlivened a power in the Speaker - an incident of the Speaker's duty - to invest the Report with the immunities and privileges of a report tabled in and printed by order of the Legislative Assembly s. 2.18(3) and (4) of the Act, but that is immaterial.) To attract jurisdiction in judicial review, it is sufficient that the Commission purported to perform statutory functions in producing and furnishing the Report. The appellants' entitlement to relief thus depends on the function which the Commission purported to perform, the requirements prescribed by the Act governing the performance of the function, the establishment of a breach of those requirements and importantly, on the remedy appropriate to a review of the production and furnishing of a report damaging to reputation. I shall consider these points seriatim.

The Function Performed

In January l990, the Chairman of the Commission was asked by the Deputy Premier, as chairman of a sub-committee of the Cabinet, to provide advice, presumably to the Government, as to areas of likely difficulty in the implementing of a Government policy to introduce gaming machines into Queensland under legislative control. The Chairman of the Commission agreed to this request and a former journalist employed by the Commission as a research officer Commenced a work to produce the Report which, under the title *Report on Gaming Machine Concerns and Regulations,* was furnished to the Chairman of the Parliamentary Criminal Justice Committee (the Parliamentary Committee), the Speaker of the Legislative Assembly and the responsible Minister of the Crown. These office-holders are the persons mentioned in s. 2.18(1) of the Act as the persons to whom a report of the Commission is to be furnished.

The Report contained material damaging to the reputations of the appellants, including the following at pp. 30-31:

> Any examination of the evidence leads to questions about relationships between Ainsworth, his executives and associates and suspect former NSW police, criminal identities and former senior NSW police. It would appear from the evidence that investigations into the Ainsworth organisation were fully warranted. This commission is aware of other matters of complaint in relation to Ainsworth where the course of investigation has been unusual.

Under a heading "Comment", this appears at p. 32:

> This Commission recommends that the Ainsworth group of companies not be permitted to participate in the gaming machine industry in Queensland.

It is not easy to discover the statutory basis on which the Report was produced and furnished. It was common ground between the parties, however, that the production and furnishing of a report to advise the Government as to areas of likely difficulty in the implementing of a policy to introduce gaming machines was within the scope of the Commission's statutory functions. Whether or not this conventional assumption is warranted, the making of the assumption was an important, if tacit, element is the cases made respectively by the appellants and the respondent. The respondent contended that the Report was validly produced and furnished to the office-holders in conformity with the Act and, on being printed,

attracted the immunities and privileges of a report tabled in and printed by order of the Legislative Assembly. (The respondent based some of its argument on the immunities and privileges attaching to a report tabled and printed by order of the Legislative Assembly but the character of the Report in that respect is immaterial to the making of the declaration to which, in my view, the appellants are entitled.) The conventional assumption is also essential to the appellants' case for relief by way of judicial review, for no relief can be granted if the Commission had not purported to perform a statutory function or to exercise a statutory power. The appellant's entitlement to judicial review must nevertheless be determined by reference to the statutory function which the Commission purported to perform.

The functions of the Commission are prescribed by s. 2.14 of the Act and fall into three categories corresponding with the three subsections of s. 2.14. That section reads as follows:

> (1) The Commission shall -
>
> (a) continually monitor, review, co-ordinate and if the Commission considers it necessary, initiate reform of the administration of criminal justice;
>
> (b) discharge such functions in the administration of criminal justice as, in the Commission's opinion, are not appropriate to be discharged, or cannot be effectively discharged, by the Police Force or other agencies of the State.
>
> In discharging its functions the Commission shall -
>
> (a) wherever practicable, consult with persons or bodies of persons known to it to have special competence or knowledge in the area of the administration of criminal justice concerned, and seek submissions from the public;
>
> and
>
> (b) in its report thereon, shall present a fair view of all submissions and recommendations made to it on the matter in relation to which it is discharging its functions, whether such submissions and recommendations are supportive of, contrary to, the Commission's recommendations on the matter.
>
> (2) Subject to s. 2.18, the Commission shall report to the Parliamentary Committee -
>
> (a) on a regular basis, in relation to the Commission's activities;
>
> (b) when instructed by the Parliamentary Committee to do so with respect to that matter, in relation to any matter that concerns the administration of criminal justice;
>
> (c) when the Commission thinks it appropriate to do so with respect to that matter, in relation to any matter that concerns the administration of criminal justice.
>
> (3) The Commission shall monitor, review, co-ordinate and initiate implementation of the recommendations relating to the administration of criminal justice contained in the Report of the Commission of Inquiry, and to that end, having regard to that report, shall prepare a program of priorities.

In performing its functions under s. 2.14(1), the Commission is required to undertake the responsibilities prescribed by s. 2.15 of the Act, including investigation of organized or major crime and reporting on proposals for reform of the law and practice relating to the administration of criminal justice. The functions which most closely approximate what was

done by the Commission are the functions conferred by s. 2.14(1)(a) and (b). The function of reporting to the Parliamentary Committee can hardly have been the function on which the Commission entered, for the Parliamentary Committee did not hold its first meeting until April 1990, after the Commission's research officer had started work on the project. Subsection (3) clearly has no application. If we assume, in accordance with the convention of the parties, that the production of the Report was one of the functions which the Commission is authorized to perform in relation to "the administration of criminal justice", the furnishing of the Report to the Parliamentary Committee can then be seen as the performance of a function under para. (c) of subsection (2). In order to determine whether the appellants are entitled to relief by way of judicial review, I shall assume that the Report was produced in purported performance of the functions prescribed by s. 214(1) and that the Report was furnished to the Parliamentary Committee in purported performance of the function prescribed by s. 2.14(2)(c). On the assumption that the Commission was performing statutory functions in producing and furnishing the Report, the furnishing of the Report to the persons mentioned in s. 2.18(1) accorded with the duty imposed by that subsection.

Conditions Governing the Performance of the Functions

If the assumption be made that the Commission was performing what purported to be statutory functions under s. 2.14(1), it must be assumed that it was required to comply with the requirements prescribed by the second paras. lettered (a) and (b) in that subsection. Those requirements scarcely seem to be applicable to a report which is intended simply to advice the Government about problems that are apprehended in the introduction of gaming machines. But, adhering to the assumption, the conditions prescribed by subsection (1) of s. 2.14 must be taken to govern the performance of the functions. Although para. (a) would arguably require that the Commission consult the appellants (who would have special knowledge as to their own conduct and character) and that the Commission seek their submissions before the Report was produced, the appellants, on appeal to this Court, did not rely primarily on s. 2.14(1). Instead, they relied on the provisions of s. 3.21(2) which reads as follows:

> The Commission shall, at all times -
>
> (a) act independently, impartially, fairly, and in the public interest,
>
> (b) act openly, except where to do so would be unfair to any person or contrary to the public interest;
>
> (c) include in its reports -
>
> (i) its recommendations with respect to the relevant subject-matter;
>
> (ii) an objective summary and comment with respect to all considerations of which it is aware that support or oppose or are otherwise pertinent to its recommendations.

The section falls within Pt III (Investigations), Div. 2 (Procedures for Taking Evidence) of the Act which, the respondent submits, deals only with the procedures applicable to a formal hearing. Section 3.17 provides that:

> The provisions of this Division apply to -
>
> (a) all proceedings conducted in discharge of any of the functions and responsibilities of the Commission.

The respondent submits that, on its true construction, s. 3.21 applies only to proceedings in which evidence is formally taken and that the requirements of the section do not condition the validity of the performance of the Commission's functions and the exercise of its powers in every instance. The respondent submits that the production and furnishing of the Report did not involve the conduct of any "proceedings" in discharge of any function of the Commission. I would agree that not every step taken by the Commission amounts to, "proceedings conducted" within the meaning of that phrase in s. 3.17. The proceedings to which Div. 2 of Pt III of the Act refers, as the context of that Division shows, are proceedings in which the Commission is "taking evidence", but "proceedings" is a term of wider denotation than "hearings". Hearings, the conduct of which is prescribed by s. 2.17, are proceedings in which evidence may be received "orally or in writing, on oath or affirmation, or by way of statutory declaration" and in which, presumably, submissions may be received from interested persons. But evidence required by the Commission to assist or guide it in the performance of its functions or the discharge of its responsibilities can be taken by means other than "hearings". "Proceedings" in s. 3.17(a) seems to me to be a term wide enough to include any gathering of information to assist or guide the Commission in the performance of its functions or the discharge of its responsibilities, but not a gathering of information which is itself the function to be performed. As "proceedings" in s. 3.17(a) are not themselves the "functions" or "responsibilities" in discharge of which the proceedings are conducted, s. 3.21 does not apply when the gathering of information is not a means to an end but the end itself, e.g., where the Intelligence Division is gathering evidence of crime. Construing s. 3.17 in this way, there is no warrant for taking s. 3.21 from its context in Div. 2 of Pt III and applying it generally to the exercise of any power or the performance of any function conferred by the Act. For example, to apply the duty to "act openly" to the function of providing witness protection or to the functions of the Intelligence Division would be incompatible with performance of those functions. But the gathering of information and the preparation of the Report by the Commission's research officer in this case was in discharge of the assumed statutory functions of producing and furnishing a report and s. 3.21 therefore must be taken to have applied to the preparation of the Report.

However, it may be doubted whether any failure to observe the requirements of s. 3.21(2) denied statutory authority to produce and furnish the Report which s. 2.14(1) was assumed to confer. Section 3.21 does not seem to me to be intended to create conditions upon the authority conferred by the Act on the Commission to perform particular functions or exercise particular powers. Take, for example, the obligation to act "fairly" in proceedings conducted in discharge of the functions and responsibilities of the Commission. It would be an extreme view that any failure to observe the injunction to "act fairly" would stamp the discharge of the function or responsibility as *ultra vires* so as to attract judicial review by way of prohibition or *certiorari*. The obligation to "act fairly" imposed by s. 3.21(2) extends to every aspect of a proceeding; it is not limited to (though it includes) the obligation to do natural justice in the course of conducting the proceeding. In my opinion, these considerations show that, although the Commission can be compelled by injunction to observe the obligations imposed by s. 3.21(2), a failure to observe those obligations does not *per se* establish that the functions and responsibilities in discharge of which the proceedings are conducted are outside the statutory authority of the Commission.

However, an obligation to accord natural justice may be implied as a condition governing the exercise of a statutory power or, I would add, a statutory function. In *Kioa v. West* [1985] 159 CLR 550, I stated the presumption that the observance of the rules of natural justice conditions the exercise of a statutory power thus:

> the presumption applies to any statutory power the exercise of which is apt to affect the interests of an individual alone or apt to affect his interests in a manner which is substantially different from the manner in which its exercise is apt to affect the interests of the public. Of course, the presumption may be displaced by the text of the statute, the nature of the power and the administrative framework created by the statute within which the power is to be exercised.

The same reasons would lead me to apply the presumption to a statutory function the exercise of which is apt to affect the reputation of an individual. As Lord Denning said in reference to inspectors appointed to report on the affairs of a company in *In re Pergamon Press Ltd.* [1971] Ch:

> The inspectors can obtain information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him.

For reasons which I have expressed elsewhere *FAI Insurances Ltd. v. Winneke* [1982] 151 CLR 342; *News Corpn. Ltd.* [1984] 156 CLR; *Kioa v. West* [1985] 159 CLR; *South Australia v. O'Shea* [1987] 163 CLR 378; *Attorney-General (NSW) v. Quin* [1990] 170 CLR 1 I do not find the concept of "legitimate expectations" illuminating of the circumstances which attract the obligation to accord natural justice. Subject to that observation, I agree with the thrust of the proposition stated by Mason CJ, Deane and McHugh JJ in *Annetts v. McCann* [1990] 170 CLR:

> It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.

Clearly the Act does not exclude the implied requirement that the rules of natural justice be observed in the preparation of a report pursuant to s. 2.14(1). For the reasons which I expressed in that case *ibid*, at pp. 608-609, I am of the opinion that:

> Personal reputation has now been established as an interest which should not be damaged by an official finding after a statutory inquiry unless the person whose reputation is likely to be affected has had a full and fair opportunity to show why the finding should not be made.

Reputation in this context is not restricted to reputation which is valuable in business: natural justice is required to be observed whenever a statutory authority contemplates a publication which would affect reputation by diminishing the estimation in which the bearer of the reputation stands in the opinion of others. The bearer of the reputation has an interest which is subject to adverse affection if the statutory authority publishes the contemplated report and that is sufficient both to attract the requirement of natural justice and to give *locus standi* to seek judicial review if natural justice is denied *Kioa v. West* [1985] 159 CLR.

In the present case, the Commission purported to perform statutory functions in producing and furnishing the Report. On the assumption that the production and furnishing of the Report were statutory functions, the Commission was bound to give the appellants an opportunity to show why a finding adverse to their reputations should not be made.

Breach of the Condition.

On the assumption that the production and furnishing of the Report were statutory functions, the Commission was bound to observe the requirements prescribed by s. 2.14(1). On that assumption, the preparation of the Report answers the description of a proceeding conducted in discharge of a function so as to attract the operation of s. 3.21(2). Yet the Commission gave the appellants no opportunity to be heard in opposition to the adverse finding and recommendation which it made in the Report. There was some urgency in the preparation of the Report, but the evidence did not show that there was insufficient time to allow the appellants an opportunity to be heard. In failing to allow the appellants that opportunity, the Commission acted in breach of the obligation expressed in s. 2.14(1) to consult and to seek submissions and in breach of the obligations expressed in s. 3.21(2) to act fairly and openly and further, the Commission failed to observe the rules of natural justice. The respondent sought to excuse the failure to take these steps by describing the Report as merely a collation of information otherwise available and not an independent investigation by the Commission. There are two answers to this submission. The first is that the terms in which the Commission couched the Report and the covering communication did not convey to the reader that the finding and recommendation were not the consequence of an independent investigation. The second is that, by making the recommendation adverse to the participation of the appellants in the gaming machine industry, the Commission expressed its agreement with the adverse conclusion drawn in the material which it had assembled. There was no authority to produce and furnish so much of the Report as was damaging to the appellants' reputations unless and until the Commission had accorded them natural justice. And, in producing the Report, the Commission acted in breach of the statutory directions contained in s. 2.14(1) and 3.21(2) of the Act.

The respondent argues that those procedural defects are immaterial because the Report was only the first step in a longer process and the longer process involved, as the Commission knew it would and intended it should involve, public hearings before the Parliamentary Committee where the appellants would have a full opportunity to meet the adverse contents of the Report. It has been held, at least in some cases, that a want of procedural fairness on the part of a repository of a power may be "cured" by an appeal to a tribunal which does accord procedural fairness and exercises the power according to its own view of the merits, not being bound by the decision of the first repository of the power see *Twist v. Randwich Municipal Council* [1976] 136 CLR 106; *Calvin v. Carr* [1980] AC 574. Where a power is reposed in a primary administrator and an appellate tribunal is authorized to exercise the same power, it may well be immaterial that a purported exercise of the power is invalidated by a failure on the part of the primary administrator to observe the rules of natural justice if the power has thereafter been validly exercised by the appellate tribunal. But that proposition has no application to the performance by the Commission of the assumed statutory functions of producing and furnishing a report. The functions prescribed by s. 2.14(1) are reposed in the Commission alone; the Parliamentary Committee cannot perform them. The functions of the Parliamentary Committee are defined by s. 4.8(1) of the Act. Those are the functions of a watchdog over the Commission; they do not extend to the production of a revision of a Commission report, though the Parliamentary Committee may "report to the Legislative Assembly on any matter appearing in or arising out of [a Commission] report": s. 4.8(1)(c). The Parliamentary Committee is thus authorized to produce its own report but its report does not supersede or set aside a report produced and furnished by the Commission. A failure by the Commission to accord natural justice to a person whose reputation is damaged by a

Commission report is not "cured" by subsequently giving the bearer of the damaged reputation an opportunity to attack the finding and to defend the reputation in proceedings before the Parliamentary Committee. Indeed, an obvious danger against which the rules of natural justice are designed to protect is the production and publication of a report that might damage a person's reputation leaving that person with no remedy save a prospect of persuading the Parliamentary Committee to re-examine the matter and express for itself a conclusion contradictory of the finding by the Commission. Even if the Parliamentary Committee rejects an adverse finding in a Commission report, that finding, having been published, may continue to inflict damage on the reputation.

The remedies available

Given that the Commission acted in breach of the statutory directions in ss. 2.14(1) and 3.21(2) in producing and furnishing so much of its Report as was damaging to the appellants' reputations and that the production and furnishing of those parts of the Report were without statutory authority by reason of the denial of natural justice, what remedies are available? The appellants first sought the issue of writs of *certiorari* to quash the Report and *mandamus* to compel the Commission to perform its functions under s. 2.14(1) *de novo*, observing the rules of natural justice on this occasion. Before the Full Court, on the return of an order *nisi* for this relief, however, they added a claim for a declaration.

Had the appellants known beforehand of the proposal to produce and furnish the Report, they could have obtained an injunction to restrain the Commission from performing that function until it had accorded natural justice to the appellants. That was in essence the remedy granted in *Annetts v. McCann.* Additionally, where a repository of a jurisdiction conditioned on observance of the rules of natural justice proposes to exercise the jurisdiction without observing those rules, a writ of prohibition *quousque* may issue to restrain the exercise of the jurisdiction until the rules are observed *Reg. v. Australian Stevedoring Industry Board; Exparte Melbourne Stevedoring Co. Pty. Ltd.* [1953] 88 CLR 100. These remedies have no relevance once a report is produced and furnished by the Commission in purported performance of its statutory functions: the Commission has then no further function to perform. Therefore the appellants sought other remedies which, it was hoped, might undo the effect of the production and furnishing of the damaging report.

Certiorari is not available. *Certiorari* might go to quash a report if its production or furnishing were to affect directly a prosecutor's rights or were to subject them in some way to a new hazard *Reg v. Collins; Exparte ACTU - Solo Enterprises Pty. Ltd.* [1976] 50 ALJR 471; and see *Brettingham-Moore v. St. Leonards Muncipality* [1969] 121 CLR 509 but, as the Commission's Report has no legal effect, there is nothing to be quashed. Quashing annihilates the legal effect of an act or decision that has been reached in breach of a condition of its validity but, if an act or decision has no legal effect, there is nothing to quash. Nor is *mandamus* an appropriate remedy. If the Commission had been under a duty to produce and furnish a report on the subject of gaming machines and if, by reason of the failure by the Commission to observe the rules of natural justice, the duty had not been performed, the appellants' case for *mandamus* would not fall at the threshold, that is, for want of a duty to be enforced by *mandamus.* Though it is appropriate to decide this case on the conventional basis that the Report was produced and furnished in performance of functions prescribed by s. 2.14(1) and (2)(c) of the Act, the Act did not and does not impose a duty to produce a report on the subject of gaming machines. In any event, the publication of the Report, the

publicity which attended the publication and the subsequent proceedings before the Parliamentary Committee diminish the utility of any relief which might annul what the Commission has done. The Commission has written what it has written and it is past recall.

That leaves for consideration the remedy of declaration. The respondent submits that no declaration should be made because, as Lawton LJ said in *Maxwell v. Dept. of Trade* [1974] QB 523 in reference to a report by inspectors of a company:

> The Courts cannot declare null and void events which have happened. What they can do is to declare that the making of a report shall have no legal consequences, as was done in *Kanda v. Govt. of Malaya* [1962] AC 322 case. The report in this case itself neither produced, nor could directly produce, any legal consequences.

In that case, Denning LJ, while refusing to restrict the Court's declaratory jurisdiction, observed *ibid*., at p. 536 that "the case must be very rare in which it would be right to make such a bare declaration in the air".

The making of a declaration and the terms in which, if made, it should be framed are in the Court's discretion. As the Privy Council said in *Ibeneweka v. Egbuna* [1964] 1 WLR 219:

> After all, it is doubtful if there is more of principle involved than the undoubted truth that the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of a declaration.

The circumstances that call for the making of a declaration are not present if there be no real controversy to be determined *Re Tooth & Co. Ltd.* [1978] 31 FLR 314. The characteristics of a controversy fit for determination by judicial declaration were stated by Viscount Dunedin in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.* [1921] 2 AC 438:

> The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.

Those elements appear in the present case.

In *Chief Constable v. Evans* [1982] 1 WLR 1155; [1982] 3 All ER 141, where a Chief Constable had given a police officer the option of resigning or having his services terminated and the Chief Constable had failed to give the officer an opportunity to deal with the allegations made against him, the House of Lords made a declaration to protect the interests of the officer who had resigned so far as those interests were susceptible of protection by declaration. Lord Brightman observed *ibid*., at pp. 153, 1172; that:

> it would, to my mind, be regrettable if a litigant who establishes that he has been legally wronged, and particularly in so important a matter as the pursuit of his chosen profession, has to be sent away from a Court of justice empty-handed save for an order for the recoupment of the expense to which he has been put in establishing a barren victory.

I respectfully agree. Where an official entity, purportedly exercising a statutory power or performing a statutory function which requires it to observe the rules of natural justice, publishes a report damaging to a person's reputation without having given that person an opportunity to be heard on the matter, *prima facie* that person is entitled to a declaration that the report, so far as it damages his or her reputation, has been produced in breach of the entity's duty to observe the rules of natural justice. The declaration cannot assert that the report was in fact erroneous for the Court is not concerned with the merits of the report. As Lord Hailsham of St. Marylebone said in *Chief Constable v. Evans ibid.*, at pp. 144, 1161:

> The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the Court.

The Commission did not accord fair treatment to the appellants and it is right so to declare.

For these reasons, I would agree with the order proposed by the joint judgment.

Also found at [1992] 3 CLJ 1306